



ATTORNEY GENERAL OF TEXAS  
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OR2005-04769

Dear Mr. Frazier and Mr. West:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 225352.

The Texas Department of Criminal Justice (the "department") received a request for ten categories of information regarding two department employees. The department and the Office of the Inspector General (the "OIG") have submitted separate briefs, as well as separate documents that each seeks to withhold from disclosure. The OIG states that it has released a portion of the requested information. The OIG further states that, in accordance with its records retention schedule, some of the requested information no longer exists.<sup>1</sup> The department claims that the information it has submitted is excepted from disclosure under sections 552.101, 552.122, and 552.134 of the Government Code. The OIG claims that the

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<sup>1</sup> The Act does not require a governmental body to disclose information that did not exist at the time the request was received, nor does it require a governmental body to prepare new information in response to a request. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

information it has submitted is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, 552.1175, and 552.134 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code §552.101. This section encompasses information other statutes make confidential. The information submitted by the department contains I-9 forms (Employment Eligibility Verification), which are governed by section 1324a of Title 8 of the United States Code. This section provides that an I-9 form and "any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the forms in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that the I-9 forms are confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

The information submitted by the department also contains W-2 and W-4 forms. Section 6103(a) of Title 26 of the United States Code provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981). Accordingly, the department must withhold these forms pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of Title 26 of the United States Code.

The department contends that a portion of the information it has submitted constitutes medical records, access to which is governed by the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b),(c). The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone

under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). After reviewing the information at issue, we find that the release of some of the information is governed by the MPA. We have marked those documents. However, we note that none of the remaining information at issue was created by a physician or by someone under the supervision of a physician. *See* Occ. Code § 159.002(b). Thus, we conclude that the department may not withhold any of the remaining information at issue pursuant to the MPA.

The department raises section 552.122 of the Government Code for a portion of its submitted information. Section 552.122 excepts from disclosure “a test item developed by a . . . governmental body[.]” Gov’t Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined that the term “test item” in section 552.122 includes “any standard means by which an individual’s or group’s knowledge or ability in a particular area is evaluated,” but does not encompass evaluations of an employee’s overall job performance or suitability. Open Records Decision No. 626 at 6 (1994). The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of “test items” might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); Open Records Decision No. 626 at 8 (1994).

The department contends that the questions and responses it has marked are excepted from disclosure under section 552.122(b). After reviewing the information, we agree that most of the submitted questions test an individual’s knowledge in a particular area and thus constitute “test items” as contemplated by section 552.122(b). Furthermore, we find that the answers to these questions might reveal the questions themselves. Therefore, pursuant to section 552.122 of the Government Code, the department may withhold the questions we have marked, as well as the corresponding preferred and actual answers. We find, however, that the remaining question is a general question evaluating an applicant’s general workplace skills and overall suitability for employment, and does not test any specific knowledge of an applicant. Accordingly, we determine that this remaining question is not a test item for purposes of section 552.122. The department may not withhold this question, or the preferred or actual answer to this question, pursuant to section 552.122 of the Government Code.

We note that the information submitted by the department includes the social security numbers of applicants for positions with the department. In Open Records Letter No. 2005-01067 (2005), we issued a previous determination that authorizes the department to withhold the personal information of a current or former employee of the department under section 552.117(a)(3) of the Government Code without the necessity of again requesting an attorney general decision with regard to the applicability of this exception. *See* Gov’t Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001) (delineating elements of second type of previous determination under Gov’t Code § 552.301(a)). Accordingly, the

department must withhold the social security numbers of current or former employees of the department in accordance with Open Records Letter No. 2005-01067.

To the extent that the submitted social security numbers are not those of current or former department employees, they may be excepted from disclosure under section 552.101. A social security number is confidential under section 552.101 in conjunction with 1990 amendments to the Social Security Act if a governmental body obtained or maintains the social security number under any provision of law enacted on or after October 1, 1990. *See* 42 U.S.C. § 405(c)(2)(C)(viii)(I); Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security numbers contained in the submitted documents are confidential under section 405(c)(2)(C)(viii)(I) of the federal law. The department has cited no law, and we are aware of no law, enacted on or after October 1, 1990 that authorizes it to obtain or maintain a social security number. Thus, we have no basis for concluding that any social security number contained in the submitted documents was obtained or is maintained under such a law and is therefore confidential under the federal law. We caution the department, however, that the Act imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing a social security number to a member of the public, the department should ensure that it was not obtained and is not maintained by the department under any provision of law enacted on or after October 1, 1990.

Both the department and the OIG raise section 552.134 of the Government Code, which relates to inmates of the department and provides in relevant part:

(a) Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the Texas Department of Criminal Justice is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code § 552.134(a). Section 552.029 of the Government Code provides:

Notwithstanding Section 508.313 or 552.134, the following information about an inmate who is confined in a facility operated by or under a contract with the Texas Department of Criminal Justice is subject to required disclosure under Section 552.021:

...

(8) basic information regarding the death of an inmate in custody, an incident involving the use of force, or an alleged crime involving the inmate.

Gov't Code § 552.029(8). The remaining information submitted by the department and all of the information submitted by the OIG concerns inmates who were confined in a facility

operated by the department. Section 552.134 is explicitly made subject to section 552.029. Under section 552.029, basic information regarding the death of an inmate in custody, an alleged crime involving an inmate, and an incident involving the use of force is subject to required disclosure. Basic information includes the time and place of the incident, names of inmates and department officials directly involved, a brief narrative of the incident, a brief description of any injuries sustained, and information regarding criminal charges or disciplinary actions filed as a result of the incident. The information at issue includes investigations of incidents involving the use of force and alleged crimes involving inmates. Accordingly, with the exception of basic information that must be released pursuant to section 552.029(8), the department and the OIG must withhold the remaining submitted information under section 552.134 of the Government Code.<sup>2</sup>

In summary, (1) the department must withhold the I-9, W-2, and W-4 forms under section 552.101 in conjunction with federal law; (2) the department may only release the marked medical records in accordance with the MPA; (3) the department may withhold the questions we have marked, and their corresponding preferred and actual responses, pursuant to section 552.122(b) of the Government Code; (3) the department must withhold the social security numbers of current or former department employees in accordance with Open Records Letter No. 2005-01067; (4) the department may be required to withhold the social security number of an individual who is not a current or former department employee under section 552.101 of the Government Code in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code; (5) with the exception of basic information that must be released pursuant to section 552.029(8), the department and the OIG must withhold the remaining submitted information under section 552.134 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

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<sup>2</sup> As section 552.134 is dispositive, we do not address the OIG's remaining arguments against disclosure.

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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LEK/jev

Ref: ID# 225352

Enc. Submitted documents

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